88-28

No.

Supreme Court, U.S.
FILED
JUL 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

IN RE SEIZURE WARRANT
CYRIL ONWUASOANYA,

Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Where petitioner's bank account was seized in contemplation of a civil forfeiture proceeding, did the ruling below conflict with *United States v. $8,850*, 461 U.S. 555, 569 (1983), by denying petitioner jurisdiction to pursue a motion for the return of illegally seized property under Federal Rule of Criminal Procedure 41(e), because no criminal case was pending, when *$8,850* sanctioned a Rule 41(e) motion in these very circumstances?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No.

IN RE SEIZURE WARRANT

CYRIL ONWUASOANYA,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The Court of Appeals opinion affirming the judgment of the District Court appears in App. A, p. 1a. The official citation is 830 F.2d 372 (D.C. Cir. 1987). The district court's summary order denying petitioner's motion for the return of property appears in App. B, p. 5a.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on October 9, 1987, App. C, p. 6a. A petition for rehearing was denied on May 19, 1988, App. D, p. 8a. The time within which

to file a petition for a writ of certiorari extends to and includes July 18, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Rule 41(e), Federal Rules of Criminal Procedure, provides:

> *Motions for Return of Property.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Rule 54(b)(5), Federal Rules of Criminal Procedure, provides in pertinent part:

> *Other Proceedings.* These rules are not applicable to . . . civil forfeiture of property for violation of a statute of the United States; . . . .

STATEMENT OF THE CASE

On March 19, 1987, a United States Magistrate in the District of Columbia issued a seizure warrant for all of petitioner's assets held by the Perpetual Bank:

> "on the premises known as Perpetual American Bank, FSB 2034 Eisenhower Avenue, Alexandria, Virginia in the Eastern District of Virginia. . . ." App. E, p. 9a.

The warrant was based on an affidavit of M.P.D. Detective Dwight Rawls alleging that the money in the bank account — $11,787.69 — was the product of narcotic trafficking and thus, subject to civil forfeiture pursuant to 21 U.S.C. 881(a)(6); (b).[1] Detective Rawls executed the warrant the same day at the Virginia address listed in the warrant. For convenience, the money was not turned over to him at that time, but was mailed to Rawls at his D.C. office in the form of a cashier's check on March 26.

On April 9, petitioner filed a motion for the return of his property pursuant to Rule 41(e), Federal Rules of Criminal Procedure, alleging *inter alia*, that the United States Magistrate in Washington, D.C., was without jurisdiction to issue a seizure warrant for property located in Virginia. The motion was denied by summary order dated April 13, and an appeal was promptly noted.

It has remained undisputed throughout these proceedings that the seizure warant was not connected to any pending criminal case against petitioner, who had not been arrested or otherwise charged with a crime.

The court of appeals dismissed petitioner's appeal, holding that since the Rule 41(e) motion was not connected to a criminal prosecution, Rule 54(b)(5), Fed. R. Crim. P., barred that

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[1]Petitioner had previously been tried and acquitted of narcotic distribution in federal district court in Washington, D.C. on April 22, 1986. (Crim. No. 86-0032-02). In that case, Detective Rawls was the undercover officer and principal witness against petitioner.

motion because the property had been seized solely for use in a civil forfeiture proceeding.

> "Fed. R. Crim. P. 54(b)(5) clearly establishes that 'these rules [*i.e.*, the Federal Rules of Criminal Procedure] are not available to . . . civil forfeiture of property for violation of a statute of the United States.' " App. A, p. 3a.

REASONS FOR GRANTING THE WRIT

In 1983, Justice O'Connor, speaking for eight members of the Court in the context of a civil forfeiture proceeding, admonished future litigants to promptly file "a motion under Federal Rule of Criminal Procedure 41(e) for a return of . . . seized property," if the initial seizure was believed to be improper. *United States v. $8,850,* 461 U.S. 555, 569 (1983). Amply armed with that good faith belief,[2] petitioner filed such a motion only to be rebuffed by the court of appeals for proceeding in the precise manner sanctioned by this Court. *United States v. $8,850,* was distinguished on the ground that it had not "directly addressed the situation here where the seizure is admittedly pursuant to a civil forfeiture action." n. 1. In fact, the claimant in *$8,850* was not arrested at the time her money was seized when she entered the United States from Canada without declaring the currency in writing. And, eight days later, the claimant was notified by mail that the funds were subject to civil forfeiture, which she could contest. Since the seizure — not incident to an arrest — was, without question, a taking intended to support a civil forfeiture, see 31 U.S.C. 5317(c), n. 1 of the court of appeals opinion, hardly shoulders its burden of distinguishing *$8,850.* Further-

[2]See Fed. R. Crim. P. 41(a) (Magistrates can only issue seizure warrants "within the district, wherein the property . . . is located"; *Weinberg v. United States,* 126 F.2d 1004 (2d Cir. 1942).

more, it is abundantly clear that this Court was targeting seizures meant to anchor civil forfeitures, since it would be quite unnecessary for the Court to have suggested the filing of Rule 41(e) motions which are routinely filed when seizures are incident to arrest and prosecution. Certiorari should thus be granted to resolve the conflict between this Court and the court of appeals. At the very least, it is only appropriate that the Court clarify this matter for the guidance of counsel. See, *e.g.*, *Application of Kingsley*, 802 F.2d 571 (1st Cir. 1986) (Coffin, J., concurring at 580):

> "Due to the quasi-criminal nature of administrative forfeiture proceedings, however, claimants must be permitted to seek the return of property seized in violation of the Constitution by filing a motion pursuant to Fed. R. Crim. P. 41(e). See *United States v. [$8,850 . . . .]*."[3]

Furthermore, as we see it, Rule 54(b)(5) has absolutely no bearing on the instant case. At the juncture petitioner sought relief, there was nowhere extant the "civil forfeiture of property for violation of a statute of the United States." *Id. Per contra*, we were attempting to rapidly trigger just such a proceeding in order to resolve the unlawful seizure question — the very goal targeted by the Court in *$8,850*. Realistically, if the Government upon review of a Rule 41(e) motion concludes that a seizure is indeed, unlawful, the property will be returned without a forfeiture proceeding ever being filed. This, we submit, underscores the fact that petitioner's case does not implicate a still inchoate civil forfeiture action, but only a motion for the return of his unlawfully seized property.

Moreover, even if the Court should conclude, as did the court of appeals, that this case does involve the civil forfeiture

---

[3]Because the Court's suggestion in *$8,850* was intended to initiate a course of action in the district courts, it went beyond mere dictum.

of property, certiorari should be granted because the application of Rule 54(b)(5) to bar a Rule 41(e) motion collides with a recent amendment to the civil forfeiture statute. The court below never addressed the October 27, 1986, amendment to 21 U.S.C. 881(b). That subsection now provides:

> "The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure."

Any perceived ambiguity in the meaning of this inartful language should be resolved in favor of petitioner; especially when it is considered in conjunction with 18 U.S.C. 981(b)(2). That companion civil forfeiture statute, effective on the same date (October 27, 1986) as the amendment to 21 U.S.C. 881(b), is aimed at drug money laundering schemes and is governed by the same procedural requirements of 19 U.S.C. 1602 *et seq.* that apply to 881(b). In addition, it contains a similar seizure warrant provision:

> "The Attorney General or the Secretary of the Treasury, as the case may be, [can obtain] a warrant for such seizure (*i.e.* of property subject to forfeiture) *pursuant to* the Federal Rules of Criminal Procedure. . . ." 18 U.S.C. 981(b)(2), (Emphasis supplied).

The difference in the authorizing language between the two subsections is obviously grounded in the fact that 881(b) was added to, while 981(b)(2) was part of a newly crafted statute seeking to strip drug dealers of their profits. It is certain, however, that these parallel forfeiture statutes are not subject to divergent interpretations insofar as the warrants they authorize are concerned.[4] Since both subsections empower

[4]Properly viewed, 881(b) authorizes a seizure warant "under the Federal Rules of Criminal Procedure."

Government agents to obtain Rule 41 seizure warrants, it would logically follow that they concommitantly embrace the remedy provided by that Rule for a failure to follow its specific mandates. The result, therefore, of incorporating Rule 41 warrants by reference into each of these forfeiture statutes, is to override the restraints Rule 54(b)(5) is thought to impose on the availability of 41(e) motions seeking the return of illegally seized property.

At bottom, no matter how this case is viewed, *Boyd v. United States*, 116 U.S. 616 (1886), weighs heavily against limiting petitioner's access to Rule 41(e). To our knowledge, *Boyd*, has not yet lost its constitutional vitality:

> "We are . . . clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. . . .
>
> As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment. . . .
>
> [A]lthough the owner of goods sought to be forfeited by a proceeding *in rem* is not the nominal party, he is nevertheless the substantial party to the suit; . . . and in a case like the present he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense."

As the Government's efforts to forfeit property for alleged narcotic law violations has dramatically escalated in recent years, this admonition in *Boyd* appears no less timely today than it did over 100 years ago.

CONCLUSION

The petition for a writ of certiorari should be granted to resolve a conflict with this Court and thus permit Rule 41(e), Federal Rules of Criminal Procedure, to operate as it was fully intended to.

Respectfully submitted,

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Counsel for Petitioner
Cyril Onwuasonaya

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-3022

IN RE SEIZURE WARRANT

CYRIL ONWUASOANYA, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(Magistrate No. 87-0223M-01)

On Motion for Summary Reversal

Filed October 9, 1987

Allan M. Palmer was on appellant's motion for summary reversal.

Joseph E. DiGenova, United States Attorney, and *Michael W. Farrell* and *Claire M. Fay*, Assistant United States Attorneys were on appellee's opposition to motion for summary reversal.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: STARR, and SILBERMAN, *Circuit Judges*; and MCGOWAN, *Senior Circuit Judge.*

Opinion for the Court filed Per Curiam.

PER CURIAM: Appellant seeks review of a district court decision denying his request for return of property seized under 21 U.S.C. § 881(a)(6) (1982). Because appellant cannot obtain relief under the Federal Rules of Criminal Procedure in a civil forfeiture case, we dismiss the appeal.

In the district court, the government sought a seizure warrant from a magistrate pursuant to 21 U.S.C. § 881 (a)(6). The government requested a warrant in order to seize the contents of appellant's bank account which, allegedly, were used for illegal drug trafficking. Under section 881(a)(6), the United States is authorized to subject "all moneys . . . furnished or intended to be furnished by any person in exchange for a controlled substance in violation of [the Drug Abuse Prevention Act]" to seizure under the procedures described in 21 U.S.C. § 881(b) and forfeiture in a civil proceeding.

The magistrate issued the warrant. Subsequently, an officer assigned to a special Drug Enforcement Administration task force took the warrant to a Virginia office of appellant's bank. The officer returned to the District of Columbia and a check for the funds in appellant's bank account was mailed from Virginia into the District of Columbia.

Thereafter, appellant brought an action in the district court seeking return of his funds. Although there was no criminal action pending against appellant and despite the civil nature of the seizure, appellant's counsel filed a pleading captioned "Motion For Return Of Property Pursuant To Rule 41(e), [Fed.] R. [Crim.] P." Rule 41(e) states in part:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in

> which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized.

Appellant argued below that the warrant was defective because the funds were located and the warrant was executed outside the territorial jurisdiction of the United States District Court for the District of Columbia.

The district court denied the motion. Appellant promptly filed this appeal and has moved for summary reversal. Before this court, appellant restates the claims which he presented below, namely, that the warrant was invalid because it was executed and the property was located outside of the district court's jurisdiction.

The government has opposed the motion for summary reversal. In its opposition, the government argues that the warrant was indeed valid and also argues that, in any event, Rule 41(e) of the Federal Rules of Criminal Procedure does not authorize the return of property subject to forfeiture under 21 U.S.C. § 881.

While we express no views on appellant's attacks on the warrant's validity, we agree with the government that appellant's property cannot be returned pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure.[1] Fed. R. Crim. P. 54(b)(5) clearly establishes that "these rules [*i.e.*, the Federal Rules of Criminal Procedure] are not available to . . . civil forfeiture of property for violation of a statute of the United States."

---

[1] *But see Guerra v. United States*, 645 F. Supp. 775, 778 (C.D. Cal. 1986) ("[T]he Supreme Court has several times suggested in dicta that where, as here, there is no criminal prosecution *in esse*, a suit pursuant to Rule 41(e) for the return of property is proper.") (citing *United States v. $8,850.00*, 461 U.S. 555, 569 (1983) and *DiBella v. United States*, 369 U.S. 121, 131-32 (1962)). Neither Supreme Court case, however, directly addressed the situation here where the seizure is admittedly pursuant to a civil forfeiture action.

This case is not one where a defendant's property was seized for use in a criminal prosecution, the defendant filed a Rule 41(e) motion in the criminal proceeding and then, following disposition of the criminal charges, the defendant renewed his Rule 41(e) action. *See United States v. Wright*, 610 F.2d 930 (D.C. Cir. 1979); *United States v. Wilson*, 540 F.2d 1100 (D.C. Cir. 1976). Here, as appellant acknowledges, "[t]he instant warrant is not associated with any pending criminal case; appellant not having been arrested nor charged with any offense in the District of Columbia or elsewhere." Motion for Summary Reversal at 3. The statutory authority relied on by the government in seeking the warrant and by the magistrate in issuing the warrant was the civil forfeiture provision of 21 U.S.C. § 881. *See United States v. $39,000 in Canadian Currency*, 801 F.2d 1210 (10th Cir. 1986) (discussing the differences between civil forfeiture under section 881 and criminal forfeiture).

Because proceedings under section 881 are civil in nature and there is no criminal proceeding with which the seizure is connected, appellant cannot avail himself of the relief provided by Fed. R. Crim. P. 41(e). *See* Fed. R. Crim. P. 54(b)(5); *United States v. Rapp*, 539 F.2d 1156, 1160-61 (8th Cir. 1976); *United States v. Greenberg*, 334 F. Supp. 364 (W.D. Pa. 1971). Therefore, we dismiss the appeal.

It is so ordered.

APPPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE SEIZURE WARRANT DIRECTED
TO PERPETUAL SAVINGS BANK FOR THE ASSETS OF CYRIL ONWUASOANYA

Mag. Dkt. 87-0223M-01
(Magistrate Burnett)

ORDER

It appearing that the return on attachment has been filed and that the attachment was made on a bank located in the District of Columbia with branches in other locations, it is by the Court this 13th day of April 1987,

ORDERED that the motion for return of property, pursuant to Rule 41(e), Federal Rules of Civil Procedure, is denied.

/s/ June L. Green
JUNE L. GREEN
U.S. DISTRICT JUDGE

FILED
APR 14 1987
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 87-3022 **September Term, 1987**

IN RE: CA 87-00223M-01

Seizure Warrant

Cyril Onwuasoanya,
Appellant

BEFORE: Starr, Silberman, Circuit Judges;
and McGowan, Senior Circuit Judge

ORDER

Upon consideration of appellant's motion for summary reversal and the opposition and reply thereto, it is

ORDERED by the court on its own motion that the appeal be dismissed. Appellant cannot obtain relief under Rule 41(e) of the Federal Rules of Criminal Procedure in this civil forfeiture case. *See* Fed. R. Crim. P. 54(b)(5); *see also United States v. Rapp*, 539 F.2d 1156, 1161 (8th Cir. 1976). It is

FURTHER ORDERED by the court that the motion for summary reversal be dismissed as moot.

The clerk is directed to withhold issuance of the mandate

herein until seven days after the disposition of any timely petition for rehearing. D.C. Cir. Rule 15.

Per Curiam

A true copy:
Test: George A. Fisher
United Staets Court of Appeals
for the District of Columbia Circuit
By: /s/ Denise Thomas, Deputy Clerk

United States Court of Appeals
for the District of Columbia Circuit
FILED OCT 9 1987
GEORGE A. FISHER
CLERK

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-3022 **September Term, 1987**

MAG. 87-00223M-01

In Re:

Seizure Warrant

Cyril Onwuasoanya,
Appellant

BEFORE: Star and Silberman, Circuit Judges*

ORDER

Upon consideration of Appellant's Petition for Rehearing, the Supplement and Opposition thereto and the Reply, it is

ORDERED, by the Court, that the petition for rehearing be denied.

Per Curiam

CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

*Senior Judge McGowan did not participate in the decision on rehearing due to his death following release of the original panel decision.

United States Court of Appeals
For the District of Columbia Circuit

FILED MAY 19 1988
CONSTANCE L. DUPRE
CLERK

APPENDIX E

AO 93 (Rev. 5/85) Seizure Warrant

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

In the Matter of the Seizure of
(Name, address or brief description of person or property to be seized)
Any and all accounts in the name
Cyril A. Onwasonya at
Perpetual American Bank, FSB

SEIZURE WARRANT
CASE NUMBER: 87-0223M-01

TO: ANY DEA AGENT OR DEA/MPDC TASK FORCE OFFICER and any Authorized Officer of the United States

Affidavit(s) having been made before me by DETECTIVE DWIGHT A. RAWLS who has reason to believe that ☐ on the person of or ☒ on the premises known as (name, description and/or location)

Perpetual American Bank, FSB
2034 Eisenhower Avenue
Alexandria, Virginia

in the Eastern District of Virginia there is now concealed a certain person or property, namely (describe the person or property)

Assets and any and all accounts in the name Cyril A. Onwasonya at Perpetual American Bank, FSB.

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-descreibed and establish grounds for the issuance of this warrant. In violation of 21 U.S.C. § 881(a)(6)

YOU ARE HEREBY COMMANDED to seize on or before March 20, 1987

the person or place named above for the person or property specified, serving this warrant and making the seizure (in the daytime — 8:00 A.M. to 5:00 P.M.) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to Arthur L. Burnett Sr. as required by law.

MAR 19 1987 at _____

Date and Time issued — City and State

_____ /s/ Arthur L. Burnett, Sr.

Name and Title of Judicial Officer — Signature of Judicial Officer

SUPPLEMENTAL

BRIEF

Supreme Court, U.S.
FILED
SEP 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

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Supreme Court of the United States
October Term, 1988

IN RE SEIZURE WARRANT
CYRIL ONWUASOANYA,

Petitioner

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

October Term, 1988

No. 88-28

IN RE SEIZURE WARRANT
CYRIL ONWUASOANYA,

Petitioner

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF

Having been notified by the Office of the Solicitor General that the Government was seeking a second thirty-day extension of time herein to answer our 8 page petition, we have taken this opportunity to present some additional materials now rather than in a reply brief.[1]

On June 16, 1987, in response to a Drug Enforcement Administration notice of forfeiture dated June 5, 1987 (Attachment A), petitioner filed an affidavit of indigency (Attachment B), and a companion demand to "contest the forfeiture in the

[1]Since this second extension will take us beyond the commencement of the October Term, any reply brief could conceivably be filed and distributed too late for the Court to consider.

United States District Court for the District of Columbia." (Attachment C)[2] Although petitioner had the uncontested right to choose that forum to hear any forfeiture case involving his property, (Attachment A, par. 3) the Government elected not to institute a forfeiture proceeding. Thus, for a period of some eighteen months since the original seizure on March 19, 1987, which deprived petitioner of the use of his money, the Government has done what it often does best in these civil forfeiture matters, *i.e.*, it has done absolutely nothing. This inaction forcefully underscores our contention that at the time petitioner's Rule 41(e) motion was filed — and continuing through today — there was no "civil forfeiture of property" *in esse* to trigger the proscription of Rule 54(b)(5). Indeed, the first official notice by the DEA to petitioner of its intention to forfeit his property, was contained in its June 5, 1987, letter to him (Attachment A) which was sent almost two months *after* his Rule 41(e) motion had been filed and denied.[3]

Had the court below ruled correctly, the Government would have been forced to either return the money to petitioner if it concluded that the seizure was unlawful or, file a forfeiture action. By ruling as it did, however, the circuit court negated this Court's expectation that a Rule 41(e) motion would cause the "rapid filing of a forfeiture action" by the Government. *United States v. $8,850,* 461 U.S. 555, 569 (1983).

In a factually equivalent case, the Eighth Circuit held that appellant "was entitled to file a Rule 41(e) motion. . . . *United States v. [$8,850]* . . ." *In re Search* and *Seizure, Al James Harper,* 835 F.2d 1273, 1274 (8th Cir. 1988).[4] In *Harper,* as here, money was seized on a tenuous legal basis by DEA

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[2]All of the materials contained in Attachments A-C were submitted to the court of appeals.

[3]Filed April 9, 1987, denied April 13. See Pet. Appendix B

[4]We were not aware of this case when the petition was filed.

Agents who told Harper *at the time* of the seizure that his funds would be held "pending civil forfeiture proceedings;" (835 F.2d 1274) and, as here, "no criminal charges were ever brought against Harper, and none [were] . . . contemplated." *(Id.)* We read this jurisdictional aspect of *Harper* as conflicting with the instant ruling. The only difference between *Harper* and the case at bar is the immaterial fact that in one case the funds were seized without a warrant, and in the other the seizure was pursuant to a warrant. The critical similarity is, however, that at the time each of the Rule 41(e) motions was filed, there was no forfeiture proceeding then extant to permit invocation of Rule 54(b)(5). In sum, *Harper* and the instant case are not distinguishable.

Respectfully submitted,

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Counsel for Petitioner
Cyril Onwuasoanya

ATTACHMENT A

LOGO
U.S. Department of Justice
Drug Enforcement Administration

SEIZURE #: 24759 CASE #: GD860034
PROP: CASHIER'S CK. PERPETUAL AMER.BK.
ID#:
VALUE: $11787.69
SEIZURE DATE: 20 MAR 87
SEIZURE PLACE: WASHINGTON, DC 20024
OWNER: CYRIL C. ONWUASONYA
SEIZED FROM: CYRIL ONWUASONYA
JUDICIAL DIST: DISTRICT OF COLUMBIA

Date: JUN 05 1987 Bond required: $1,178.00

Cyril Onwuasonya
8542 16th St., # 203
Silver Spring Md. 20910

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (USC), Section 881. The seizure date and place, as well as other pertinent information regarding the property are also shown above. Pursuant to Title 19 USC, Section 1602-1619, and Title 21, Code of Federal Regulations (CFR), Sections 1316.71 - 1316.81, procedures to administrativley forfeit this property are under way. You may petition the DEA to return the property or your interest in it to you (remission or mitigation), and/or you may contest the seizure and forfeiture of the property in *COURT*.

TO REQUEST REMISSION OR MITIGATION OF THE FORFEITURE

If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation

within *thirty (30) days* from your receipt of this notice. Follow the regulations set forth in Title 28, CFR, Sections 9.1 - 9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. Attach proof of your ownership interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Unit. No bond is necessary if only a petition is filed.

TO CONTEST THE FORFEITURE

In the alternative, you may contest the forfeiture of the seized property in UNITED STATES DISTRICT COURT. To do so, *you must file a claim of ownership and bond* with the DEA. Submit the bond in the amount shown above in a *cashier's check* or a *certified check* payable to the U.S. Department of Justice, or present satisfactory surety.

If you are indigent (needy and poor) you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called a "Declaration in Support of Request to Proceed *IN FORMA PAUPERIS*" along with a claim of ownership of the property. Use the format of the *pauperis* declaration following Rule 48 of the Federal Rules of Appellate Procedure, or obtain a form from the DEA field office. The claim of ownership, with either bond or the "Declaration in Support of Request to Proceed *IN FORMA PAUPERIS,*" must be filed within *twenty (20) days* of the *first date* of publication of the notice of seizure in the Wednesday edition of *USA Today*. The notice will be published three successive weeks. You should review that newspaper for the exact date.

WHERE TO SUBMIT CORRESPONDENCE

Submit all documents to THE DRUG ENFORCEMENT ADMINISTRATION, OFFICE OF CHIEF COUNSEL, ASSET FORFEITURE UNIT, 1405 I STREET, N.W., WASHINGTON, D.C. 20537. Use the seizure number identifier above in submitting the petition, the claim and bond, or other correspondence with the DEA. Failure to do so may cause delay in DEA's action on this matter.

/s/ William J. Snider
William J. Snider
Forfeiture Counsel

ATTACHMENT B

U.S. Department of Justice
Drug Enforcement Administration

SEIZURE #: 24759 CASE #: GD860034
PROP: CASHIER'S CK. PERPETUAL AMER.BK.
ID#:
VALUE: $11787.69
SEIZURE DATE: 20 MAR 87
SEIZURE PLACE: WASHINGTON, DC 20024
OWNER: CYRIL C. ONWUASONYA
SEIZED FROM: CYRIL ONWUASONYA
JUDICIAL DIST: DISTRICT OF COLUMBIA

Date: JUN 05 1987	Bond required: $1,178.00

Cyril Onwuasonya
8542 16th St., # 203
Silver Spring Md. 20910

Declaration In Support of Request to Proceed IN FORMA PAUPERIS

I, Cyril Onwuasoanya, declare that because of my poverty I am unable to provide a bond of $1,178.00 necessary to contest the forfeiture in the above-described case.

1. I am not presently employed. I have never worked in this country but have always been a student.

2. I have received money in the past 12 months from my family in Nigeria.

   a. In the past 12 months I have received a total of $40,000 from my family.

3. I have no checking or savings account and my present cash on hand is $700.00 which has been borrowed from a fellow Nigerian student.

4. I do not own any real estate, stocks, bonds, notes, or

other valuable property other than a 1982 Volkswagen Rabbit, which is registered to me.

I understand that a fale statement by me in this affidavit will subject me to penalties for perjury.

/s/ Cyril Onwuasoanya
Cyril Onwuasoanya

Subscribed and sworn to me this 16th day of June 1987.
/s/ Dorothy J. Pinche, Notary
MY COMMISSION EXPIRES JULY 31, 1990

ATTACHMENT C

U.S. Department of Justice
Drug Enforcement Administration

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Cyril Onwuasonya
8542 16th St., # 203
Silver Spring Md. 20910

Claim of Ownership to Contest the Above Forfeiture In United States District Court

I, Cyril Onwuasoanya, hereby claim ownership of the above-described $11,787.69, seized from my bank account on March 20, 1987, and want to contest the forfeiture in the United States District Court for the District of Columbia.

/s/ Cyril Onwuasoanya
Cyril Onwuasoanya

June 16, 1987

Supreme Court, U.S.
FILED
OCT 7 1988
CLERK

No. 88-28

In the Supreme Court of the United States

OCTOBER TERM, 1988

CYRIL ONWUASOANYA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1988

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CYRIL ONWUASOANYA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that court of appeals erred in holding that he could not file a motion under Fed. R. Crim. P. 41(e) for the return of property that was seized in aid of a civil forfeiture under 21 U.S.C. (& Supp. IV) 881. However, petitioner's motion for return of the property is now moot, because the United States has decided not to seek forfeiture of the property and therefore is returning the property to petitioner.

1. On March 19, 1987, a United States Magistrate in the District of Columbia issued a warrant for the seizure of funds in petitioner's account with the Perpetual American Bank. The warrant was in aid of a civil forfeiture, pursuant to 21 U.S.C. 881(a)(6). The application for the seizure warrant alleged that the contents of petitioner's bank account—$11,787.69—were the proceeds of or were intended to be used for illegal drug trafficking. The office of Perpetual American Bank identified in the application and the warrant was located in Alexandria, Virginia. See Pet. App. 9a.[1] The warrant was served on the Alexandria office of the bank on March 19, 1987. On March 26, 1987, the bank sent a cashier's check for the amount in petitioner's account to the DEA office in Washington, D.C. (C.A. Mot. for Summary Reversal, Exh. 2). In his Rule 41(e) motion, filed on April 9, 1987, petitioner argued that the federal magistrate in the District of Columbia did not have authority to issue a warrant for the seizure of assets that were located in Virginia, because Rule 41(a) provides that a warrant may be issued "by a federal magistrate * * * within the district wherein the property is located" (C.A. Mot. for Summary Reversal, Exh. 3). Without requesting a response from the government, the district court, by order dated April 13, 1987, denied petitioner's motion, explaining that the attachment was made on a bank located in the District of Columbia that had branches in other locations (Pet. App. 5a).

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[1] The application for the warrant and the supporting affidavit of Detective Dwight Rawls were attached as Exhibit B to the United States' Opposition to Motion for Summary Reversal in the court of appeals.

Petitioner then appealed and sought summary reversal of the district court's order. The court of appeals did not reach the merits of the validity of the warrant. Instead, it held that petitioner could not invoke the remedy afforded by Fed. R. Crim. P. 41(e), and it therefore dismissed the appeal (Pet. App. 1a-4a). The court of appeals noted that, as petitioner conceded, "[t]his case is not one where a defendant's property was seized for use in a criminal prosecution," to which Fed. R. Crim. P. 41 concededly would be applicable (Pet. App. 4a). Rather, "[t]he statutory authority relied on by the government in seeking the warrant and by the magistrate in issuing the warrant was the civil forfeiture provision of 21 U.S.C. § 881" (Pet. App. 4a). The court held that Fed. R. Crim. P. 41(e) is unavailable in such a case, because Fed. R. Crim. P. 54(b)(5) expressly provides that " 'these rules [*i.e.*, the Federal Rules of Criminal Procedure] are not applicable to * * * civil forfeiture of property for violation of a statute of the United States' " (Pet. App. 3a, quoting Fed R. Crim. P. 54(b)(5) (material in brackets added by the court)). In a footnote, the court of appeals acknowledged this Court's statement in *United States* v. *$8,850*, 461 U.S. 555, 569 (1983), that a motion under Rule 41(e) would lie where the claimant wished to challenge the legality of the seizure. But the court of appeals concluded that the Court's statement was dictum because the Court had not directly confronted the situation in this case, "where the seizure is admittedly pursuant to a civil forfeiture action" (Pet. App. 3a n.1).

2. In the meantime, after the district court denied petitioner's motion for return of the property under Rule 41(e), DEA instituted administrative forfeiture

proceedings pursuant to 21 U.S.C. 881(d) and 19 U.S.C. (& Supp. IV) 1607. On June 5, 1987, DEA notified petitioner of those proceedings and of his right to contest the forfeiture in court by filing a claim of ownership and bond with DEA (Pet. Supp. Br. Attachment A).[2] On June 16, 1987, petitioner responded by filing a claim of ownership, stating that he wished to contest the forfeiture in the United States District Court for the District of Columbia (Pet. Supp. Br. Attachment C). The claim of ownership was accompanied by a request to proceed in forma pauperis, and thereby to be excused from the requirement that he post a bond as a condition of contesting the forefeiture in court (Pet. Supp. Br. Attachment B). We have been informed that DEA forwarded the case to the Office of the United States Attorney for the District of Columbia on September 30, 1987, for institution of civil forfeiture proceedings.

By letter dated September 20, 1988, the United States Attorney's Office informed DEA that it had declined to file a civil proceeding for the forfeiture of the funds seized from petitioner's bank account. In response to that letter, DEA on October 6, 1988, sent a letter to the local DEA office instructing it to return the funds to petitioner. A copy of that letter was sent to the United States Marshal, who has custody of the cashier's check. Petitioner's motion under Fed. R. Crim. P. 41(e) seeking a judicial order compelling return of the property therefore is moot.

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[2] "Pet. Supp. Br." refers to the supplemental brief filed by petitioner in support of his petition for a writ of certiorari on September 16, 1988.

It therefore is respectfully submitted that the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand with instructions to dismiss the proceedings arising out of petitioner's Rule 41(e) motion as moot. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 38-39 (1950).

CHARLES FRIED
Solicitor General

OCTOBER 1988

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Supreme Court, U.S.
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No. 88-28

IN THE
Supreme Court of the United States
October Term, 1988

IN RE SEIZURE WARRANT
CYRIL ONWUASOANYA,

Petitioner

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES

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CYRIL ONWUASOANYA,

Petitioner

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES

Notwithstanding its victories in two lower courts, the Government has suddenly decided to abandon the fray by agreeing to return petitioner's funds it unlawfully seized eighteen months ago. Although the Government believes that this decision automatically moots the case, (Mem. 5) we think otherwise.

1. Contrary to the assertion that the United States Marshal has custody of the cashier's check sent by petitioner's bank to the DEA, (Mem. 2, 4) and inferably all the Marshal need do is turn it over to petitioner, we are informed* that the check was deposited in the Riggs Bank on April 10, 1987, by the Marshal's Service into an interest bearing general holding

*Source: Mrs. Betty Bryant, Assistant Seized Property Officer, U.S. Marshal's Service, Washington, D.C.

account pending resolution of the case. Having dealt with the federal bureaucracy for over two decades, counsel is far from confident that in these circumstances petitioner will obtain his money anytime soon. Although the Solicitor General is anxious to have this case rendered moot, we notice that neither he nor any of his deputies have personally undertaken any steps during the ninety days that the petition has been pending to assure the return of the funds to petitioner, relying instead upon other interagency action to effect that goal. At bottom, petitioner is no better off now than he was when his Rule 41(e) motion was filed, thus leaving us with a very real live controversy.

2. In seeking to buy its way out of an apparently troublesome case, the Government's buyout plan embraces petitioner's funds and no other. However, since these funds have been illegally held for eighteen months,[1] petitioner is clearly entitled to receive the interest he would have earned had his bank account not been raided. After all, if the Government sought to moot this case, it should properly have done so over a year ago before the court of appeals rendered its judgment, rather than wait until the eleventh hour. In this context it is not unfair to conclude that, absent the petition, the Government's largesse would not have been forthcoming. Furthermore, the Government has absolutely no claim, over and above that of petitioner's, to the interest his money has earned while deposited in the general holding account of the Marshal's Service. Were it otherwise, the Government would literally profit from its own wrongdoing. Thus, we submit, that the failure of the Government to proffer any "interest on money illegally held for a period of time "precludes a finding of mootness. *Ellis v. Railway Clerks*, 466 U.S. 435, 441-442 (1984) "[A]s

[1]An assertion properly assumed for present purposes. See Pet. n.2 and text.

long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.*

3. Regardless of whether the money is returned, the case will not be moot because the underlying dispute is one "capable of repetition, yet evading review." *Gannett Co. v. De Pasquale*, 443 U.S. 368, 377 (1979).

a. The life-span of a Rule 41(e) motion in this context will not realistically survive full appellate review. In the future, all of the district judges in this jurisdiction will deny similar motions on the basis of the court of appeals' opinion herein, even if that judgment is vacated. In the latter event, they will doubtless look to the vacated opinion as an advisory ruling. While the judgment may be gone, its force and effect will surely linger on. Hard on the heels of any Rule 41(e) dismissal for want of jurisdiction, the Government will, nonetheless, normally either file a forfeiture proceeding or return the property. Either alternative will, obviously, preclude review of the dismissal; just as the Government is seeking to do now at this final stage of the appellate process. And, in the event a forfeiture action is filed, the Fourth Amendment issue can be raised directly therein.

b. Although it is unlikely that petitioner will be subject to the same action once more, *Gerstein v. Pugh*, 420 U.S. 103 (1975) (n.11 at 110) suggests that this is not always required and that alternative considerations can fulfill this criterion. In *Gerstein*, for example, it was deemed sufficient that "a constant existence of a class of persons suffering the deprivation is certain." *Id.* Similarly, if past is prologue, we are assured of a steady stream of litigants seeking the return of their allegedly unlawfully seized property pursuant to Rule 41(e). In fact, some two months after the seizure herein, an elite unit was created in the Metropolitan Police Department

whose sole mission is to seek out property for forfeiture that is allegedly tied to narcotic trafficking; *i.e.*, the Financial Investigation Unit headed by Lt. Zelford C. Platt. In this connection, we are informed that the seizure of money alone, unattended by arrests for narcotic possession offenses, is on a steady increase here, mainly occurring at motels, train and bus stations. This, no doubt, mirrors what is happening around the country which includes all of the airports, where drug interdiction teams are in constant operation. See, *e.g.*, *In re Search and Seizure, Al James Harper*, 835 F.2d 1273 (8th Cir. 1988); *United States* v. *$8,850, infra.*

Another factor militating against mootness herein, is the rather remarkable situation wherein the ruling below directly conflicts with and frustrates Justice O'Connor's directive to aggrieved persons to promptly file Rule 41(e), motions "if the initial seizure was believed to be improper." *United States v. $8,850*, 461 U.S. 555, 569 (1983). Indeed, on May 18, 1988, present counsel refused to pursue a seizure of money unaccompanied by an arrest involving $34,475, although the seizure was believed to be unlawful, because of the roadblock erected by the opinion herein.[2] No other remedy counsel knows of provides a swifter or surer mechanism to restore unlawfully seized non-contraband property than Rule 41(e).

One final matter deserves comment. In seeking to apply the procedure outlined in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 38-39 (1950) — intended to preclude the unfair effect of res judicata in moot *civil* cases — the Solicitor General wishes to obtain the equivalent of a confession or error without confessing error. In viewing this as a civil case, he has made

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[2]At that time the money was being processed for a potential civil forfeiture by none other than Detective Dwight Rawls, see Pet. p. 3, a member of the newly created Financial Investigation Unit.

precisely the same mistake as the court of appeals, which led it to erroneously conclude that Fed. R. Crim. P. 54(b)(5) barred our Rule 41(e) motion. This never has been a civil case, because no forfeiture action was ever filed concerning petitioner's funds.[3] See Mem. 1, 4.

CONCLUSION

For the reasons stated, we urge, that the instant case is not moot and that the Court should consider the petition for a writ of certiorari as submitted.

Respectfully submitted,

ALLAN M. PALMER
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Washington, D.C. 20036
(202) 785-3900

Counsel for Petitioner
Cyril Onwuasoanya

October 14, 1988

[3]Once petitioner's money was in the custody of the government, nothing — other than the Fourth Amendment — prevented its use as evidence in a criminal prosecution against him.

(5)

Supreme Court, U.S.
FILED
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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

3 pp

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Pursuant to Rule 22.6 of the Rules of this Court, the Solicitor General respectfully files this supplemental memorandum to inform the Court that on October 21, 1988, a check in the amount of the funds that were seized from petitioner's bank account was delivered to counsel for petitioner at the Office of the United States Marshal, which had custody of the funds. Because the property in question has been returned to petitioner, there no longer is a live controversy in this case over whether petitioner was entitled to file a motion under Fed. R. Crim. P. 41(e) seeking the return of that property. This development removes any doubt that this case is moot.

Petitioner stated in his reply brief (at 1-2), filed on October 18, 1988, that the seized funds had been placed by the Marshal's Service in an interest-bearing account. However, petitioner subsequently informed the Clerk, by letter dated October 20, 1988, that this statement was er-

roneous. The Marshal's Service likewise has informed us that the account in which the funds were deposited does not draw interest. Accordingly, if we assume for present purposes that Rule 41(e) applies in this setting, there can be no basis for a claim that the property "returned" to petitioner under Fed. R. Crim. P. 41(e) must include interest that was actually earned on the property while it was in federal custody.

It is unclear whether petitioner further argues that he is entitled to be paid interest even though the funds did not actually earn interest during the period that they were in federal custody. But even if petitioner's filings are understood to present such an argument, that argument cannot be litigated in proceedings on a motion for return of property under Fed. R. Crim. P. 41(e). As a jurisdictional matter, any claim to a money judgment representing the interest that petitioner believes should be paid on the property must be litigated in another forum, such as in the district court or the Claims Court under 28 U.S.C. 1346(a)(2) or 1491—although, on the merits, the United States would not in any event be liable for an allegedly unauthorized or otherwise wrongful seizure of property. *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 127 n.16 (1974); *Florida Rock Industries, Inc.* v. *United States,* 791 F.2d 893, 899 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987); see also 28 U.S.C. 2680(c). Accordingly, the matter of interest does not save petitioner's claim under Fed. R. Crim. P. 41(e) from being moot.

Respectfully submitted.

CHARLES FRIED
Solicitor General

OCTOBER 1988

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